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MICHAEL RODAK, JR., CLERK

in the

Supreme Court

of the

United States

NO. 72-783

FRANK EUGENE SEELEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MIAMI REVIEW — 371-4853 — 377-3721

INDEX

	Page
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING WRIT	7
CONCLUSION	18
CERTIFICATE OF SERVICE	19
APPENDIX A	App. 1
APPENDIX B	App. 3

TABLE OF CITATIONS

Case	Page
Aguilar v. Texas, 378 U.S. 108 (1964)	8, 9
Bary v. United States, 248 F.2d 201, (10th Cir., 1957)	13
Berger v. United States, 295 U.S. 78 (1935)	12
Bruton v. United States, 391 U.S. 123 (1968)	16
Delli Paoli v. United States, 352 U.S. 232 (1957)	16
Gandy v. United States, 386 F.2d 516 (5th Cir., 1967)	13, 15
Giordenello v. United States, 357 U.S. 480 (1958)	9, 10
Gordon v. United States, 438 F.2d 858 (5th Cir., 1971)	17
Jackson v. Denno, 378 U.S. 368 (1964)	16
Jones v. United States, 362 U.S. 257 (1960)	8, 11

TABLE OF CITATIONS (cont.)

Case	Page
Pierce v. United States, 86 F.2d 949, (6th Cir., 1953)	12
Schneble v. Florida, 92 S.Ct. 1056 (1972)	16
Spinelli v. United States, 393 U.S. 410 (1969)	7, 10
United States v. Flanagan, 423 F.2d 745 (5th Cir., 1970)	9
United States v. Valdez, 418 F.2d 363 (5th Cir., 1969)	17
Viereck v. United States, 318 U.S. 236 (1943)	12, 13
Wakakasan v. United States, 367 F.2d 639 (8th Cir., 1966)	13

OTHER AUTHORITIES

Federal Rules of Criminal Procedure Rule 41	7

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NO. _____

FRANK EUGENE SEELEY,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, FRANK EUGENE SEELEY, respectfully prays that a writ of certiorari issue to review opinion of the United States Court of Appeals for the Fifth Circuit entered in the above styled cause on October 2, 1972, and from the opinion and judgment made final by the Order of Denial of the Petition for Rehearing entered on October 30, 1972.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is made a part of the Appendix hereto, together with the Order denying Petition for Rehearing.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its opinion on October 2, 1972 and judgment was rendered by entry of an Order of Denial of the Petition for Rehearing on October 30, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

I. WHETHER THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS IN THAT THE EVIDENCE WAS OBTAINED PURSUANT TO A DEFECTIVE SEARCH WARRANT AND AFFIDAVIT, VIOLATING THE APPELLANT'S RIGHT TO BE FREE FROM ILLEGAL SEARCH AND SEIZURES AS GUARANTEED HIM UNDER THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

II. WHETHER THE TRIAL COURT ERRED IN NOT GRANTING A MISTRIAL DUE

TO THE INFLAMMATORY REMARKS OF THE UNITED STATES ATTORNEY IN HIS CLOSING ARGUMENTS TO THE JURY, THUS DENYING THE APPELLANT A FAIR TRIAL AND DUE PROCESS OF LAW AS GUARANTEED HIM BY THE FIFTH AND SIXTH AMENDMENTS OF THE UNITED STATES CONSTITUTION?

III. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION OR OTHERWISE ERRED IN NOT GRANTING THE APPELLANT A SEVERANCE OF TRIAL FROM HIS CO-DEFENDANTS, THUS DENYING HIM A FAIR TRIAL AND DUE PROCESS OF LAW AS GUARANTEED HIM UNDER THE FIFTH AMENDMENT TO THE UNITEL STATES CONSTITUTION, IN THAT CERTAIN ADMISSIONS AND CONFESSIONS OF HIS CO-DEFENDANTS WERE ADMITTED INTO TRIAL AND THE APPELLANT WAS DENIED HIS RIGHT TO CROSS-EXAMINE THESE WITNESSES AGAINST HIM BECAUSE OF THE JOINT TRIAL IN VIOLATION OF THE APPELLANT'S RIGHTS AS GUARANTEED UNDER THE SIXTH AMENDMENT TO THE CONSTITUTION?

STATEMENT OF THE CASE

In August of 1970, Jefferson Weseley Holland, Jr. notified the Alcohol, Tobacco and Firearms Division of the United States Department of the Treasury, that he was interested in becoming a special employee of that division (T. 134). He contacted Charles Hudson, a special investigator of the Alcohol, Tobacco and Firearms Division (hereinafter called "AT&F") from the Orlando, Florida office. Holland was employed by the AT&F and on August 6, 1970 telephoned Eugene Peter Linale, who resided in Miami, Florida, with reference to the illegal sale to Holland of firearms.

On August 16, 1970 Mr. Linale delivered to Mr. Holland some Dupont dynamite (T. 143). On August 22, 1970, Mr. Holland had a further conversation with Mr. Linale at which time they agreed to purchase certain firearms and silencers from Mr. Linale (T. 147). On August 26, 1970, Mr. Holland purchased from Mr. Linale one firearm with an attached silencer (T. 157).

On September 1, 1970, Mr. Holland had another conversation with Mr. Linale by telephone and at that time Mr. Linale offered to sell to Mr. Holland additional firearms and silencers, a brief case "model" of a firearm (T. 159) and "time bombs" (T. 160). On September 5, 1970 Mr. Linale and Mr. Holland met, and Mr. Linale sold to Mr. Holland two 22-caliber pistols with attached silencers (T. 166). Furthermore, on that same day, Mr. Linale offered to sell to Mr. Holland some stolen weapons (T. 163).

After further telephone conversations between Mr. Linale and Mr. Holland, they agreed to purchase addi-

tional weapons and silencers from Mr. Linale. On September 19, 1970 Bannister R. Barnett and Mr. Linale obtained from FRANK SEELEY six weapons with silencers and two brief-case model weapons (T. 293-295). Thereafter, Mr. Linale and Mr. Barnett traveled to meet Mr. Holland and Mr. Truitt to make the sale to them, and were arrested by AT&F agents before making the sale.

On the 8th day of October, 1970, Charles E. Hudson went before Florida Circuit Court Judge Archie M. Odum and filed an affidavit for a search warrant for the premises owned by FRANK EUGENE SEELEY, and upon that affidavit, Judge Odum issued a search warrant, pursuant to Rule 41 of the F.R. Cr. P. On October 19, 1970, the premises of FRANK EUGENE SEELEY were searched and many contraband items were seized.

On November 18, 1970 a four count indictment was issued by the Grand Jury against FRANK EUGENE SEELEY and on that same date, a twenty-four (24) count indictment was issued by the Grand Jury against Phyllis Jean Linale, Eugene Peter Linale, and Frank Eugene Seeley.

The following Pre-Trial motions were made:

1. Motion for a Bill of Particulars.
2. Motion to Dismiss the Indictment.
3. Motion to Srike.
4. Motion for Severence.

All of which were denied by the District Court Judge on March 26, 1971. Furthermore, the Appellant Seeley further moved to suppress the evidence contending they were the fruits of an illegal search and seizure; this was denied by the District Court Judge on March 24, 1971.

On October 4, 1971 the Appellant Seeley, along with Mr. Linale and Mrs. Linale were tried upon the charges in the two indictments from the Grand Jury.

During the trial, the Appellant Seeley moved to suppress the evidence again when it was introduced (T. 624 & 626). The Appellant relied upon the same grounds as presented in the pre-trial motion to suppress. The motion was again denied by the Trial Judge (T. 624 & 626).

The Appellant Seeley, at the close of the evidence, moved for a Judgment of Acquittal on the grounds that the Government had not proved a prima facie case and that the evidence against the Appellant Seeley was obtained through an illegal search and seizure (T. 957 & 958). The Court denied the motions "in toto" (T. 963). Appellant Seeley then objected to the introduction of the admissions of co-defendant Mrs. Linale on the grounds that the statements were made after the conspiracy had ended and that introduction of those admissions were highly prejudicial to Mr. Seeley (T. 1058). These statements were objected to when they were introduced into evidence also (T. 599).

During the course of the closing arguments by the Government, the prosecutor referred to the brief-case model weapons as "assassination kits". The prosecutor used the term "assassination kit" three times during his

closing arguments (T. 1100, 1148 & 1166). The Appellant objected and moved for a mistrial, which the Court denied (T. 1166 & 1167).

The Trial Judge then instructed the jury, and various objections were made by Appellant Seeley to the instructions (T. 1242-43). The jury deliberated upon the charges and found the Appellant Seeley quilty of all the counts (T. 1247-48). A timely notice of appeal was filed and this appeal follows.

REASONS FOR GRANTING WRIT

The Court of Appeals has decided important questions of Federal law which have not been, but should be, settled by this Court.

I

Throughout the trial, the Government was allowed to introduce evidence which was obtained pursuant to a defective search warrant and affidavit, violating the Appellant's right to be free from illegal search and seizure as guaranteed him under the Fourth Amendment of the United States Constitution.

In order for a search warrant to be issued, the affiant must submit an affidavit to the Magistrate which states with sufficient particularity the grounds for the issuance of the search warrant and the source of the information upon which the affiants reasons are based, Fed. R. Crim. P. Rule 41; See, e.g., **Spinelli v. United States** 393 U.S. 410 (1969). Furthermore, this affidavit must state the

reasons for the issuance of the search warrant, with an adequate showing of probable cause, U.S. Const. Amend. IV.

The information which establishes probable cause must be more than the mere suspicious beliefs or conclusions of the affiant, **Aquilar v. Texas**, 378 U.S. 108 (1964). As the United States Supreme Court said in **Aguilar:**

> For all that appears (in the affidavit), the source here merely suspected, believed, or concluded that there were narcotics in the petitioner's possession. The magistrate here certainly could not "judge for himself the persuasiveness of the facts relied on . . . to show probable cause". He necessarily accepted "without question" the informant's "suspicion", "belief" or "mere conclusions",

Id. at 113-114. The Court further stated that affidavits could be based upon hearsay evidence and need not reflect the direct personal observations of the affiant, citing, **Jones v. United States**, 362 U.S. 257 (1960), but made the following limitations to hearsay information. The Court said that the affidavit must inform the Magistrate of

> "some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the circumstances from which the affiant concluded that the informant, whose identity need not be disclosed (cite omitted), was 'credible' or his information 'reliable'."

Id. at 114

The Court in **Aguilar** stated that if the above requirements were not met,

> "the inferences from the facts which lead to the complaint" will be drawn not "by a neutral and detached magistrate", as the Constitution requires, but instead by a police officer "engaged in the often competitive enterprise of ferreting out crime . . ."

Id. at 115. Since the affidavit in **Aguilar** was based upon information from a confidential informant, without stating the grounds upon which the informant based his beliefs, and without stating the grounds upon which the officer believed that the informant was "reliable", the warrant was defective.

The information in the affidavit can come from one of three sources. "The affidavit may be based on personal observation of the affiant or hearsay, or a combination thereof", **United States v. Flanagan,** 423 F.2d 745-747 (5th Cir., 1970). If the affidavit is based upon hearsay, then the standards in **Aguilar** must be met.

However, if the affidavit is based upon the personal observations of the affiant, then the affidavit must contain an affirmative allegation stating that to be the case. **Giordenello v. United States,** 357 U.S. 480 (1958). In **Giordenello,** the Supreme Court held that the search warrant was defective because

> The complaint contains no affirmative allegation that the affiant spoke from personal knowledge of the matters contained therein; it does not

> indicate any sources for the complaintant's belief; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made.

Id. at 486. The Court further stated that

> these deficiencies could not be cured by the Commissioner's reliance upon a presumption that the complaint was made on the personal knowledge of the complaining officer.

Id.

When the affiant is based upon hearsay and personal observations, then the unreliable informant's statements coupled with personal observation can establish probable cause to issue the search warrant. **Spinelli v. United States**, 393 U.S. 410 (1969). Therefore, under **Spinelli**, after receiving information from an unreliable informant, the affiant may breathe new life into the allegations of the informant by making personal observations. These personal observations, coupled with the informant's statements can be sufficient to constitute probable cause.

It is clear that neither the tests of **Giordenello**, **Aquilar** or **Spinelli**, have been met. Therefore, the Magistrate could not have determined probable cause from the affidavit. Here, as in **Aguilar**, the determination of probable cause was made by the affiant and not by a "neutral and detached magistrate".

The search warrant was not based upon probable cause and, therefore, the search and seizure of the Ap-

pellant's home was unreasonable and in violation of his Fourth Amendment rights. As Justice Douglas said in his concurring in part opinion in **Jones v. United States:**

> It is not sufficient that the police think there is cause for an invasion of the privacy of the home. The judicial officer must also be convinced; and to him the police must go except for emergency situations. The magistrate must know the evidence on which the police propose to act. Unless that is the requirement, unless the magistrate makes his independent judgment on all the known facts, then he tends to become merely the tool of police interest. Though the police are honest and their aims worthy, history shows they are not appropriate guardians of the privacy which the Fourth Amendment protects.

Jones v. United States, 362 U.S. 257, 273 (1960).

Therefore, the District Court erred in not suppressing the evidence of the illegal search and seizure.

II

The United States Attorney made inflammatory remarks to the jury in his closing arguments. This action denied the Appellant a fair trial, an impartial jury, and due process of law as guaranteed him by the Fifth and Sixth Amendments of the Constitution.

It is the duty of the United States Attorney, in any criminal trial, to insure that the jury is impartial and that justice is done. The United States Supreme Court has said:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that the guilty shall not escape or innocent suffer. He may prosecute with earnestness and vigor—indeed, he should do so. **But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.**

Berger v. United States, 295 U.S. 78-88 (1935) (Emphasis added). Additionally, the Supreme Court has said that when the prosecutor acts improperly, so as to inflame the jury by his closing argument, that "the trial judge should stop counsel's discourse without waiting for an objection". **Viereck v. United States**, 318 U.S. 236, 248 (1943). Therefore, when the United States Attorney makes harmful and prejudicial remarks to the jury, an objection on the part of the defendant is not necessary to preserve the error, because the error is fundamental.

When improper remarks are made, the Trial Judge should declare a mistrial where the remarks are so "pronounced and persistent that the cumulative effect upon the jury cannot be disregarded as inconsequential". **Pierce v. United States**, 86 F.2d 949, 953 (6th Cir., 1953), citing, **Berger v. United States**, 295 U.S. 78, 89 (1935).

Generally, "the arguments of counsel must be confined to the issues of the case, the applicable law, pertinent evidence, and legitimate inferences as may be properly drawn therefrom". **Wakakasan v. United States,** 367 F.2d 639, 646 (8th Cir., 1966). In the case of **Bary v. United States,** the Tenth Circuit dealt with remarks by the prosecutor in a case dealing with members of the Communist Party. The prosecutor, in his closing argument, said that a verdict of guilty by the jurors would be a verdict for America. The Tenth Circuit reversed the conviction and ordered a new trial and stated:

> It is the recognized privilege of counsel to indulge freely in fair argument to the jury. But there are certain well established limits beyond which counsel is forbidden to go even in a moment of enthusiasm, ardor, or zeal. The portions of the argument referred to were reasonably calculated to arouse prejudice against appellants and, therefore, exceeded permitted bounds.

Bary v. United States, 248 F.2d 201, 213 (10th Cir., 1957), citing, **Viereck v. United States,** 318 U.S. 236 (1943).

Furthermore, as previously mentioned, counsel in their closing arguments cannot make statements about items not in evidence. Additionally, lawyers cannot make representations of fact on their own responsibility. **Gandy v. United States,** 386 F.2d 516 (5th Cir., 1967).

Therefore, whenever a United States Attorney oversteps the limits of his closing argument and prejudice results, a mistrial should be ordered.

In the case, **sub judice**, the United States Attorney referred to the "brief-case model" weapons as "assassination kits" in the opening part of his closing arguments to the jury (T. 1100). Thereafter, in the rebuttal argument in his closing the United States Attorney again referred to the weapons as "assassination kits" (T. 1149). Finally, the United States Attorney said:

> You will recall the conversation in which they talked of the method by which these particular "assassination kits" were used. And you will recall in that conversation that this defendant Linale instructed Special Agent Holland on how to use them, how you aim them—you just tilt it slightly—how they are triggered, what the device is for. Ladies and gentlemen, I submit to you that's what this case is all about. That's why the federal government got into this field of regulating firearms. It is to prevent just this type of device which is designed for only one purpose, which is the surreptitious taking of human life (T. 1166).

At that time the defendants objected to the remarks as highly prejudicial and improper and moved for a mistrial. The mistrial was denied and the Court instructed the jury to disregard the inflammatory remarks, after the damage was done.

The United States Attorney repeatedly used inflammatory descriptions of the weapons in the trial and further, testified to the jury as to why the Federal Government had passed the 1968 Firearms Act. This testi-

mony was wholly from outside the record and the inflammatory remarks were made merely to prejudice the jury against the Appellant.

> As this Court stated in **Gandy v. United States**, lawyers in their jury arguments are never to make representations of fact on their own responsibility. They are advocates and not witnesses.

Id. at 518.

Therefore, the United States Attorney testified during his closing argument and also made inflammatory remarks, used for the express purpose of prejudicing the Appellant and denying him a fair and impartial trial and jury—violative of the Appellant's Fifth and Sixth Amendment rights.

III

The Appellant was denied a fair trial and due process of law as guaranteed him under the Fifth Amendment to the United States Constitution when the trial court abused its discretion by not granting the Appellant a severance of trial from his co-defendants, in that certain admissions and confessions of his co-defendants were admitted into trial and the Appellant was denied his right to cross-examine these witnesses against him because of the joint trial in violation of the Appellant's rights as guaranteed him under the Sixth Amendment to the Constitution.

This Honorable Court has stated that where defendants are joined, and the confession of one is introduced which implicates his co-defendants, the co-defendant is denied a fair trial and the right to confront and cross-examine witnesses against him. **Bruton v. United States**, 391 U.S. 123 (1968).

Originally, this Court had held that if the Trial Judge instructs the jury to only accept the confession as to the party making the statements, and not as to any implicated co-defendants, then the co-defendants were not denied a fair trial, **Delli Paoli v. United States**, 352 U.S. 232 (1957). However, **Bruton** expressly overruled the **Delli Paoli** case and said that the jury instruction in **Bruton** was just as ineffective and futile as the jury instructions in cases like **Jackson v. Denno**, 378 U.S. 368 (1964). In **Bruton**, the Court re-emphasized the holding in **Jackson**, that a jury instruction cannot mend the damage done by the introduction of the evidence.

The Court held that in a **Bruton** situation, the jury instruction is "ineffective in that the effect of such a non-admissible declaration cannot be wiped from the brains of the jurors". **Id.** at 129. The Court held that the effect of the admission of the declaration is as if "There had been no instruction at all". **Id.** at 137.

Bruton v. United States, held that the Government has one of two choices in such a case. (1) severe the trial or (2) not introduce the confession. However, the holding in **Bruton** has been modified somewhat, by this Court in **Schneble v. Florida**, 92 S.Ct. 1056 (1972). **Schneble** said that if the evidence is so overwhelming as to guilt without the confession, the introduction of the confession can be harmless error.

The general rule is that severance is discretionary and an appellate court will not reverse the trial judge for not severing unless there was an abuse of discretion. **Gordon v. United States** 438 F.2d 858 (5th Cir., 1971); **United States v. Valdez,** 418 F.2d 363 (5th Cir., 1969). However, in the case of a **Bruton** type confession, this discretion on the part of the judge becomes an absolute duty to sever the trials.

In the case, **sub judice,** the co-defendants' admissions or declarations were admitted into evidence, implicating the Appellant. At those points, the Appellant moved to strike the admissions because of the prejudicial spill-over they would have upon the Appellant. Furthermore, the Appellant timely moved for a severance, stating as grounds for the severance that the co-defendants would not testify for him in a joint trial, that there would be prejudicial spill-over in a joint trial, and that the evidence was so overwhelming as to his co-defendants and insignificant as to the Appellant, that he would be denied a fair trial without a severance. The motion was denied and the Appellant was duly prejudiced by the joint trial. Therefore, the Trial Judge should have granted a severance, and the denial of a severance violated the Appellant's right to a fair trial and his right to confront and cross-examine witnesses under the Fifth and Sixth Amendments of the United States Constitution.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

THEODORE KLEIN
Fine Jacobson Block & Semet, P.A.
Attorneys for Petitioner
2401 Douglas Road
Miami, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the United States Attorney, Post Office, Box 2841, Tampa, Florida 33601 and to the office of the Soliciter General, United States Department of Justice, Washington, D. C. 20530, this ____ day of November, 1972.

THEODORE KLEIN

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 72-1773 and 72-1774

Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

FRANK EUGENE SEELEY,
PHYLLIS JEAN LINALE
and EUGENE PETER LINALE,
Defendants-Appellants.

Appeals from the United States District Court for the Middle District of Florida

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(October 2, 1972)

Before THORNBERRY, COLEMAN and INGRAHAM, Circuit Judges.

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*Rule 18, 5 Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

PER CURIAM: A jury found Eugene Peter Linale guilty on thirteen counts of violating the laws of the United States with reference to firearms, plus an additional count charging a conspiracy to do so. Frank Eugene Seeley was also convicted on a number of counts, charging similar offenses. Mrs. Phyllis Jean Linale was convicted of conspiracy.

The appeal seeks reversal predicated on the following grounds: (1) insufficiency of the evidence, (2) entrapment, (3) failure to suppress evidence obtained by an assertedly illegal search, (4) failure to grant a severance, (5) judicial non-compliance with Rule 25 of the Federal Rules of Criminal Procedure, and (6) improper prosecutorial oral argument.

Finding no effective merit in any of these contentions, the judgments of convictions are, as to all three appellants.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

October 30, 1972

TO ALL PARTIES LISTED BELOW

Re: Nos. 72-1773 and 72-1774 — U.S.A. vs. Frank E. Seeley, Phyllis J. Linale and Eugene P. Linale

Gentleman:

You are hereby advised that the Court has today entered an order* denying the Petition ( ) for Rehearing in the above case. No opinion was rendered in connection therewith. See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By /s/ Alvin M. Winchester
Deputy Clerk

/amw

cc: Mr. Claude Tison, Jr.
Mr. John L. Briggs
Mr. Theodore Klein
Mr. Harold Mendelow
*As to Frank Eugene Seeley